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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5908

LEON CHAMBERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR THE PETITIONER

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Chambers contends that state hearsay and party-witness rules worked to deny him a fair trial in violation of the Sixth and Fourteenth Amendments. He does not challenge the rules on their face. Rather, he makes the narrow contention that the rules are unconstitutional *as applied to his case* because they prevented him from putting on a defense.

Mississippi does not address the constitutional questions presented. It relies upon the validity of foreign rules on their face, instead of discussing the validity of its own rules as applied. It argues about facets of state law that have no bearing on Chambers' constitutional claim. And it confuses the fundamental difference between his use of McDonald's oral confessions to exculpate himself, and his use of them to impeach McDonald as witness against him.

I.

CHAMBERS HAS A CONSTITUTIONAL RIGHT TO OFFER McDONALD'S CONFESSIONS TO EXCULPATE HIMSELF.

Chambers has a right, as a matter of Compulsory Process and Due Process, to offer McDonald's confessions to exculpate himself. The Mississippi hearsay rule is unconstitutional as applied, because the constitutional interest in receiving exculpatory testimony overcomes whatever nonconstitutional interests underlie the rule.

A. The Federal Hearsay Rule Does Not Support the Decision Below.

Mississippi can derive no comfort from the federal hearsay rule of *Donnelly v. United States*, 228 U.S. 243 (1913). The Court in *Donnelly* did not consider the constitutional right of the accused to offer third-person confessions to exculpate himself. Rather, it exercised its jurisdiction over federal criminal trials to establish a federal hearsay rule for declarations against penal interest. The rule obviously has no effect on matters of proof in state trials.

Donnelly is distinguishable, moreover, even on its facts. There was some question in *Donnelly* whether the

declarant had actually confessed. In this case, on the other hand, McDonald's three oral confessions were independently corroborated both by one another and by his written confession. Again, even assuming the declarant in *Donnelly* actually confessed, the fact that he died before trial precluded him from being cross-examined about the truth of his confession. Here McDonald was not only present at trial but thoroughly examined by the prosecution about the truth of his sworn confession.

Finally, Mississippi cannot invoke a general federal rule to support a particular application of its own rule. Both rules are presumably valid on their face. The question is whether Mississippi may constitutionally apply its rule in the circumstances of this case. Mississippi has avoided that question by mistaken reference to other rules in other circumstances.

Donnelly's real significance for this case, if any, lies elsewhere. Far from supporting the Mississippi rule, the federal experience with *Donnelly* serves only to undermine its rationale. The Court of Appeals for the Second Circuit, for example, finds the rule "indefensible," *United States v. Annunziato*, 293 F.2d 373, 378, (2d Cir. 1961) (Friendly, J.) *cert. denied*, 368 U.S. 919 (1961), while the Ninth Circuit casts explicit doubt on its continued vitality.[1] The Court itself had occasion recently to question the rule:

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[1] "[There is] the question as to how old, or how badly reasoned, or both, a Supreme Court decision on a question of evidence must be before we are to feel free to refuse to follow it." *Scolari v. United States*, 406 F.2d 563, 564 (9th Cir. 1969), *cert. denied*, 395 U.S. 981 (1969).

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these [declarations against penal interest]. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility. . . ." *United States v. Harris*, 403 U.S. 573, 583 (1971) (Opinion of Burger, C.J.).

In short, the tenuous interests underlying the rule are probably not enough to save it as a general rule of evidence. But they are certainly "not . . . sufficient to overrride the defendant's right" to exculpate himself in this case. See *Brooks v. Tennessee*, 406 U.S. 605, 611 (1972).

B. McDonald's Presence at Trial Satisfied Mississippi's Hearsay Interests.

Third-party confessions are inadmissible under Mississippi rules, whether or not the declarant is present to testify. At the same time, Mississippi now refers to McDonald's presence as a reason for excluding his confessions. To that extent, it relies on a rule in some states that declarations against penal interest, which are otherwise admissible, become inadmissible where the declarant is present as a witness.

Mississippi has inverted the real significance of McDonald's presence at trial. Far from supporting the rule below, his presence rendered the rule unnecessary in this case. Where a constitutional interest conflicts with a state interest, the Court must ordinarily decide which interest prevails. See *Brooks v. Tennessee*, 406 U.S. 605 (1972). But McDonald's presence here provided an alternative means for avoiding such a conflict. For

reasons set forth in *California v. Green*, 399 U.S. 149 (1970), his presence enabled Mississippi to receive his oral confessions while simultaneously satisfying its state hearsay interests.

The prosecution in *Green* used an out-of-court statement to convict the accused under a state rule that permitted hearsay to be received in the presence of the declarant. The Court sustained the rule against constitutional attack. It held that the presence of the declarant eliminates the constitutional objections to his unsworn and uncross-examined statements. The declarant either accepts the out-of-court statement and incorporates it as his own direct testimony, or he denies the statement and becomes available for rebuttal. In either case, the trier of fact has a chance to place the declarant under oath and to observe his demeanor. For those reasons, "the dangers of hearsay are largely non-existent where the witness testifies at trial." *California v. Green*, 399 U.S. at 155.

Because "hearsay rules and the Confrontation Clause are generally designed to protect similar values" (*ibid*), what was true in *Green* is *a fortiori* here. Since the declarant's presence satisfied Mr. Green's constitutional objection to the use of incriminating hearsay, McDonald's presence would have satisfied Mississippi's objection to the use of exculpatory hearsay. It was not "necessary" to deny Chambers the liberty of offering the confession on his behalf.[2] Mississippi could have eliminated whatever

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[2] In considering the right to vote, the Court held last Term that states may not interfere with fundamental liberties unless their laws are "reasonably necessary to the accomplishment of legitimate state objectives":

"Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise . . . we conclude . . .

hearsay dangers accompanied McDonald's oral confessions by the simple alternative of calling him to the stand.

It is irrelevant that some states prefer to exclude third-party confessions where the declarant can testify in person. Their reasons have nothing to do with the inherent reliability of the confessions. They would agree that the declarant's presence strengthens his out-of-court statements.[3] They simply see no "need," as a matter of state law, to accept the second-hand statements of a witness who can testify in court.

There is no question here of determining state needs. The accused has an overriding need of his own to exculpate himself with whatever evidence is available. His needs do not depend on state preferences, but are protected by the constitutional rights of Due Process and Compulsory Process. The states cannot suppress material confessions in favor of the accused by arbitrarily denying the need for them.

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that the laws must be 'closely scrutinized' and found *reasonably necessary* to the accomplishment of legitimate state objectives in order to pass constitutional muster.

* * * * *

"[U]nder the standard of review we consider applicable in this case, *there must be a showing of necessity*." *Bullock v. Carter*, 405 U.S. 134, 144, 147 (1972) (emphasis added).

[3] "If [the declarant] is available, the credibility of his extrajudicial statements is not lessened by the fact. Furthermore, the opportunity for cross-examination would eliminate the basic objection to the hearsay character of the evidence." *Spriggs v. California*, 60 Cal. 2d 868, 875, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964) (Traynor, C.J.).

C. McDonald's Oral Confessions Would Have Influenced the Jury.

Mississippi recognizes the probative force of McDonald's oral confessions. Indeed, it went so far as to repeatedly deny Chambers the benefit of offering them on his behalf. It now insists, however, that the error of excluding the confessions was harmless. It refers to the fact that McDonald's sworn confession was read to the jury and contends that his oral confessions were simply "cumulative" of that exculpatory evidence already in the record.

Mississippi overstates its case. The error at trial consisted not of admitting tainted evidence but of excluding exculpatory evidence. With errors of exculpatory evidence, the reviewing court examines the record as if the evidence had been properly received[4] and decides whether that evidence would have affected the verdict. It is reversible error to exclude exculpatory evidence that "may have had an effect on the outcome of the trial," *Napue v. Illinois*, 360 U.S. 264, 272 (1959), or that "could . . . in any reasonable likelihood have affected the judgment of the jury." *Id.* at 271. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Judge Friendly has formulated the test as follows:

> "The test, however, is . . . whether . . . there was a significant chance that this added item [of evidence] . . . could have induced a reasonable

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[4]With errors of tainted evidence, on the other hand, the reviewing court treats the record as if the evidence had been properly excluded and decides whether the remaining evidence of guilt supports the conviction. *Harrington v. California*, 395 U.S. 250 (1969). See also *Milton v. Wainwright*, ____ U.S. ____, ____ (June 22, 1972) (slip op. 7).

doubt in the minds of enough jurors to avoid a conviction." *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969) (footnote omitted).

McDonald's oral confessions were more persuasive than his sworn statement and would have independently influenced the jury. The prosecution succeeded, after all, in discrediting the sworn confession. It emphasized that McDonald made the statement almost four months after the shooting, that he delivered it in the presence of lawyers for Chambers, and that, being illiterate, he had to sign it with an "X." Furthermore, McDonald himself helped to repudiate his written confession. He testified that the statement was false, that the words were put into his mouth, and that he signed it in hope of pecuniary gain.

McDonald's oral confessions, on the other hand, were unimpeachable. He made his oral statements spontaneously within hours of the shooting. He delivered them—not to strangers—but to friends and neighbors who witnessed the shooting. He told the same thing to each of them independently. In short, the oral confessions did more than duplicate his sworn confession. They made it irresistible. They were compelling evidence of Chambers' innocence and would "in any reasonable likelihood have affected the judgment of the jury." *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

II.

CHAMBERS HAS A CONSTITUTIONAL RIGHT TO CONFRONT McDONALD AS A WITNESS AGAINST HIM.

McDonald became a *witness against Chambers*, under the Confrontation Clause of the Sixth and Due Process clause of the Fourteenth Amendments, when he denied the facts upon which Chambers rested his defense. Yet the Mississippi party-witness rule barred Chambers from cross-examining and impeaching his own witness. The rule as applied in this case is unconstitutional because it denied Chambers the right to confront a witness whose testimony prejudiced his defense.

A. Chambers Was Denied the Right to Cross-Examine McDonald.

Mississippi repeatedly implies that Chambers did examine McDonald about his reasons for signing the sworn confession, about his subsequent repudiation of the confession, and about his actions on the night of the murder.[5] That is simply not the case. Chambers did not examine McDonald in any form about those facts. He questioned McDonald on direct examination only about

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[5] "At Chamber's trial McDonald was called as a defense witness. He was allowed to testify about his confession, Reverend Stokes' promise to him and his subsequent repudiation of that confession. He testified that he did not kill Liberty and had nothing whatsoever to do with the killing" (Resp. Br. 3).

"At the trial below Leon Chambers called Gable McDonald as a defense witness. McDonald testified extensively as to his out-of-court confession, his subsequent repudiation of that confession and his actions and conduct on the night of the murder of Aaron Liberty" (Resp. Br. 5).

the authenticity of the sworn confession. It was the *prosecution alone* that questioned McDonald about the truth of his confession and his actions on the night of the murder. When Chambers moved to cross-examine McDonald about his damaging testimony to the prosecution, his request was flatly denied.

Mississippi also suggests, in various ways, that "Chambers was allowed to question McDonald extensively and was not denied the right to ask any question" (Resp. Br. 4).[6] Again, Mississippi misleads the Court. Chambers did not put questions to McDonald on cross-examination because he had been explicitly prohibited from doing so. He made repeated attempts to cross-examine McDonald. He filed a formal motion at the very start of the trial to examine McDonald as an adverse witness, but the trial court refused to rule on it until McDonald had testified (A. 61). After McDonald testified to the prosecution, the defense pressed its motion again:

> "I want to ask the Court, request that we be permitted—it's very obvious and apparent that this witness is an adverse and unfriendly witness, and in accordance with our motion that has been previously filed in this Court, we ask that this witness be declared to be an adverse witness, a hostile witness and permit us to propound questions to him as if on cross-examination" (A. 121).

This time the court flatly denied the request (A. 121). It did not wait for Chambers to ask specific questions. It

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[6] Mississippi states in its brief that "McDonald appeared as a defense witness and answered all questions asked. . . . Chambers was not refused the opportunity to ask any question" (Resp. Br. 12); and that "Chambers was not limited in his examination of McDonald" (Resp. Br. 13).

simply ruled his questions out altogether. Chambers can hardly be faulted for complying with the court's order.

B. Chambers Was Also Denied the Right to Confront McDonald with a Prior Confession.

Having been denied the right to impeach McDonald through cross-examination, Chambers tried to impeach him with McDonald's prior confession to Albert Carter ("Carter confession"). Again, the trial court denied him the right to confront McDonald as a witness against him. Mississippi now confuses the constitutional effect of the denial by making the untenable assumption that McDonald's oral confessions were all part of Chambers' affirmative defense, and that Chambers failed to perfect his right to use them.

1. *Chambers Offered the Carter Confession in Order To Impeach McDonald as a Witness Against Him.*

Mississippi confuses the different purposes for which Chambers offered McDonald's oral confessions. Chambers offered McDonald's confession to Sam Hardin ("Hardin confession") and Berkley Turner ("Turner confession") as hearsay—that is, for the truth of the confessions—in order to exculpate himself. Those confessions formed part of his affirmative defense under the Compulsory Process and Due Process Clauses of the Sixth and Fourteenth Amendments. They had nothing to do with his right of confrontation. Mississippi's assumption otherwise (Resp. Br. 4) is an oversight.

In contrast to the Hardin and Turner confessions, Chambers offered the Carter confession as part of his

right of confrontation and to impeach McDonald's testimony to the prosecution. He called Carter as a witness after McDonald repudiated his sworn confession and denied shooting Officer Liberty. He tendered the Carter confession—not for its truth—but as the prior inconsistent statement of a *witness against him* under the Confrontation Clause and Due Process Clause of the Sixth and Fourteenth Amendments. Mississippi is simply mistaken in treating the Carter confession as hearsay (Resp. Br. 8).

2. *Chambers Was Precluded from Laying a Foundation for the Carter Confession.*

Mississippi ignores the constitutional effect of denying Chambers the right to confront McDonald with the Carter confession. Instead, it argues as a matter of state law that Chambers failed to lay a proper foundation for the prior inconsistent confession. It argues that Chambers should have given McDonald a chance to explain the Carter confession before impeaching him, McDonald, with it.

The argument is misdirected.[7] For one thing, it was implicitly rejected by the court below. The Mississippi Supreme Court was urged to find that Chambers had failed to lay a proper foundation for the impeaching confession (Brief for Appellee 15-16). But it refused to

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[7]It should be noted—despite Mississippi's confusion to the contrary (Resp. Br. 8)—that the matter of laying a proper foundation has nothing to do with the Hardin and Turner confessions. The rule requires a party to lay a foundation for a *prior inconsistent statement*. It does not require a party to lay a foundation for hearsay statements that are offered for their truth.

do so. Instead, it decided as a substantive matter that Chambers had no right to impeach his own witness. This Court should not now decide a question of state procedure that the state court below considered and implicitly denied.

Furthermore, the Mississippi Supreme Court had good reason to reject the argument. Chambers did not lay a foundation for the prior inconsistent statement because he was not allowed to. He had no cause to impeach McDonald at all until McDonald was examined by the prosecution. It was only then that McDonald contradicted his prior confession to Carter by denying that he shot Officer Liberty. At that point, however, Chambers could no longer put foundation questions to McDonald about the Carter confession, because he had just been denied the right to cross-examine McDonald about his role in the shooting. To lay a foundation after the prosecution examined McDonald would have required Chambers to ask questions in the nature of cross-examination—which is precisely what the trial court forbad. Justice Rogers explained it in his dissenting opinion:

> "The defendant requested the right to cross-examine the witness as to his explanation of the confession. The court refused to permit the defendant to cross-examine the witness upon the ground that he was hostile. The defendant was thus prevented from laying a predicate to impeach the witness" (A. 156).

C. Whether or not Chambers Was "Surprised" by McDonald's Testimony Is Irrelevant.

Mississippi raises another issue of state law that was not decided below and that has no bearing on the constitutional question before the Court. It asserts that Chambers was not "surprised" by McDonald's adverse

testimony, and that the absence of surprise, under the state party-witness rule, is another reason to preclude Chambers from impeaching his own witness. Neither assertion finds support in the opinion below. But even if they are accepted, they only dramatize that the Mississippi rule did apply to deny Chambers the right to confront a witness against him. They have no bearing on whether the rule, so applied, is constitutional.

There is some question, under Mississippi law, whether surprise has anything to do with the right of a party to impeach "adverse" witnesses of his own.[8] But even assuming that it does, the courts below refused to make any findings concerning surprise. The trial court decided that Chambers could not impeach McDonald by finding that McDonald was not "adverse" to him. It did not rule on the question of surprise. Likewise, although the Mississippi Supreme Court was urged to find that Chambers was not surprised by McDonald's testimony (Appellee's Br. at 15-16), it refused to do so. Instead, it affirmed on the ground that McDonald was not an adverse witness. As far as this Court is concerned, the matter of surprise was considered below and dismissed.

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[8]It is not clear that a party must be "surprised" under the Mississippi rule before he can impeach an "adverse" witness of his own. The rule distinguishes between adverse witnesses and hostile witnesses. See *Faust v. State*, 221 Miss. 668, 74 So. 2d 817 (1954). A "hostile" witness is one whose testimony proves unresponsive, *Hall v. State*, 250 Miss. 253, 165 So. 2d 345 (1964), or inconsistent with his prior statements. *Dunk v. State*, 84 Miss. 452, 455, 36 So. 609, 610 (1904). An "adverse" witness, on the other hand, is one whose testimony directly incriminates ("points the finger at") the accused. While a party must show surprise before impeaching hostile witnesses of his own, *Hooks v. State*, ____ *Miss.* ____ 197 So. 2d 238 (1967), the same may not be true of adverse witnesses.

Mississippi cannot ask the Court to decide a question of state law that its own courts so assiduously avoided.

In any event, it makes no difference whether the Mississippi rule requires surprise or whether Chambers was surprised within the meaning of the rule. Those are matters of state law to be considered in deciding whether the rule should have been applied. But in fact the rule was applied. The only question here is whether that application of the rule is constitutional. The constitutional right of the accused to confront the witnesses against him is not affected by state findings of "surprise."

D. The Federal Witness Rule Does Not Support the Decision Below.

Mississippi ignores the constitutionality of its own rule as applied, and invokes the federal rule that a party may not generally impeach his own witnesses. The federal rule has no effect, of course, on state proceedings. But even if the federal rule governed it would not have produced the result below. To the contrary, it would have afforded Chambers precisely what he sought—an opportunity to confront McDonald as a witness against him.

The federal rule affords the accused considerable scope in confronting his own witnesses. While the accused in Mississippi may not impeach his own witnesses, unless they directly incriminate him, the accused in a federal proceeding may impeach his own witnesses wherever their testimony is "prejudicial" to his defense. *Hickory v. United States*, 151 U.S. 303, 309 (1894). He may impeach any witness of his own who "affirmatively damages" his case, *Bushaw v. United States*, 353 F.2d 477 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966) or who "tends to aid the case of the adverse party."

Randazzo v. United States, 300 F. 794, 797 (8th Cir. 1924). Although McDonald did not directly incriminate Chambers, he denied the very facts upon which Chambers rested his defense. To that extent, he prejudiced and damaged the case for Chambers within the meaning of the federal rule.[9]

CONCLUSION

For the reasons stated above and in the brief for the petitioner, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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[9]It should be noted that some consider even the federal rule to be unduly restrictive. The Proposed Federal Rules of Evidence for United States Courts and Magistrates gives the accused an unbridled right to impeach his own witnesses:

> "The credibility of a witness may be attacked by any party, including the party calling him." Rule 607 (second revised draft).

By that standard, Chambers would not even have to show that McDonald's testimony prejudiced his defense.